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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

NO. 445

STAPLING MACHINES COMPANY, AND BERNARD LEONARD TIGHE, JR., Counsel for Stapling Machines Company

vs.

A. H. STONE, Chairman, State Tax Commission of the State of Mississippi

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

NO._____

STAPLING MACHINES COMPANY ..... Appellant

vs.

A. H. STONE, CHAIRMAN
STATE TAX COMMISSION ..... Appellee

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STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

Appellee in the above styled cause, for his statement in opposition to appellant's statement as to jurisdiction herein, and in support of appellee's motion to dismiss or affirm, would respectfully show the following:

I.

STATEMENT OF FACTS AND ISSUES ON APPEAL

This is an appeal from a decision rendered by the Supreme Court of Mississippi on June 14, 1954, and reported in 73 So. (2d) 123 (advance sheet). Suggestion of Error was overruled on July 23, 1954. Appellant, a Delaware corporation having a place of business in Rockaway, New Jersey, leased by written contract certain box making machines to various persons in the State

of Mississippi. The lessees did not obtain title to the machines, same remaining in (lessor) appellant, but lessees obtained only the right to the use of the machines. Appellant had neither offices nor agents within the State of Mississippi.

The machines were used for the manufacture of both patented and unpatented boxes and the consideration paid for the use of the machines was: (a) the cost of production of said machines; (b) sums of money equal to four per cent of the gross sales of the patented boxes and (c) sums of money equal to two per cent on the gross sales of all unpatented boxes. These sums were considered by appellant as being royalties with the situs in New Jersey, which could not be taxed by the State of Mississippi. In another case the Supreme Court of Mississippi has held appellant liable for the payment of a sales tax on the rental of these machines the court holding that the machines obtained a business situs within the State of Mississippi. *Stone vs. Stapling Machines Co.*, 71 So. (2d) 205. Appeal in this case was dismissed by this Court on October 14, 1954, in cause No. 106 for lack of a substantial federal question. The instant case involved the question of appellant's liability for income tax under the statutes of Mississippi, including as items of income both the rentals and royalties received from the use of the machines within the State of Mississippi. The income of appellant being determined by use of a formula which was not questioned by appellant.

Section 9226, *Mississippi Code of* 1942 provides, in part:

"(1) In the case of foreign corporation of or a nonresident or citizen of a foreign country the following

items of gross income shall be treated as income from sources within the state.

"(a) . . . rental or royalties from property or any interest in property within the State; and income from the operation, or ownership of any property within the State."

II.

APPELLANT HAS FAILED TO BRING ITSELF WITHIN APPELLATE JURISDICTION OF THIS COURT.

Appellant has the affirmative obligation of showing that this Court has jurisdiction of its cause. *Memphis Natural Gas Co. vs. Beeler*, 315 U. S. 649, 62 S. Ct. 857, 86 L. Ed. 1090; *Gorman vs. Washington University*, 316 U. S. 98, 62 S. Ct. 962, 86 L. Ed. 1300 and *Republic Natural Gas Co. vs. Oklahoma*, 334 U. S. 62, 68 S. Ct. 972, 92 L. Ed. 1212. This burden the appellant has entirely failed to meet herein. Appellant grounded its case in the trial court solely on the proposition that the transaction sought to be taxed by the State was one in interstate commerce and, therefore, not liable to state taxation. Appellant's strongest and clearest statement is that contained in paragraph three of its petition in the trial court, which, at most, is only a general statement and does not challenge the constitutionality of any particular statute as is required by 28 *USCA* 1257 (2) upon which statute appellant predicates this appeal. Such a general objection to the exercise of authority under a state statute is insufficient to sustain the appellate jurisdiction of this Court. *Jett Bros. Distilling Co. vs. Carrollton*, 252 U. S. 1, 40 S. Ct. 255, 64 L. Ed. 421. *Memphis Natural Gas Co. vs. Beeler*, 315 U. S. 649, 62 S. Ct. 857, 86 L. Ed. 1090. Appellant not having raised the question of the

constitutionality of a state statute under the Federal Constitution in the trial court is precluded from raising it in this Court. *Zadig vs. Baldwin*, 166 U. S. 485, 17 S. Ct. 639, 41 L. Ed. 1087.

III.

NO SUBSTANTIAL FEDERAL QUESTION IS INVOLVED IN THIS CAUSE

(A)

DOCTRINE OF MOBILIA SEQUNNTUR PERSONAM HAS NO CONSTITUTIONAL GUARANTEE

Appellant has predicated its entire cause upon the doctrine of mobilia sequnntur personam and the petition filed in the trial court so reflects. This doctrine found its highest expression in the case of *First National Bank of Boston vs. Maine*, 284 U. S. 312, 76 L. Ed. 313, 52 S. Ct. 174, but which case was subsequently specifically overruled by this Court in *State Tax Commission of Utah vs. Aldrich*, 316 U. S. 174, 181, 62 S. Ct. 1006, 86 L. Ed. 1358, 1370, 139 A. L. R. 1435, wherein this Court stated:

> "For the reasons stated we do not think that First Nat. Bank vs. Maine should survive. We overrule it. In line with our recent decisions in Curry v. McCanless, Graves v. Elliott and Graves v. Schmidlapp we repeat that there is no constitutional rule of immunity from taxation of intangibles by more than one state . . . . "

Where the owner of property regardless of whether tangible or intangible, moves the property or his activities to a place other than his domicile he invokes the protection and benefits of the laws of another state and, therefore, subjects himself to the tax laws there. *Curry vs. McCanless*, 307 U. S. 357, 59 S. Ct. 900, 83 L. Ed. 1339, 123 A. L. R. 162 and the plea of double taxation is unavailing. *State Tax Commission vs. Aldrich*, 316 U. S. 174, 62 S. Ct.

1008, 86 L. Ed. 1358, 139 A. L. R. 1436; *Curry vs. McCanless*, 307 U. S. 357, 59 S. Ct. 900, 83 L. Ed. 1338, 123 A. L. R. 162; *Blackstone vs. Miller*, 188 U. S. 189, 23 S. Ct. 277, 47 L. Ed. 439.

(B)

INTERSTATE COMMERCE MAY BE MADE TO PAY ITS WAY

The mere fact that a transaction sought to be taxed is one in interstate commerce is not sufficient within itself to defeat the imposition of the tax.

This Court has held that interstate commerce may be made to pay its way. *Spector Motor Service, Inc. vs. O'Connor*, 340 U. S. 602, 71 S. Ct. 508, 95 L. Ed. 573, *Freeman vs. Hewit*, 329 U. S. 249, 67 S. Ct. 274, 91 L. Ed. 265.

It is only the regulation of interstate commerce which is reserved to the Congress.

> ". . . Forms of state taxation whose tendency is to prohibit the commerce or place it at a disadvantage as compared or in competition with intrastate commerce and any state tax which discriminates against the commerce, are familiar examples of the exercise of state taxing power in an unconstitutional manner, because of its obvious regulatory effect upon commerce between the states."

McGoldrick vs. Berwind-White Coal Mining Co., 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565, 569.

The tax imposed by the State of Mississippi and complained of herein by appellant is no different as regards appellant than it is as to the citizens of the State. Nor is it a tax upon the privilege of actually engaging in interstate commerce as was held to be violative of the "Commerce clause" in *Spector Motor Service, Inc. vs. O'Connor*, 340 U. S. 602, 71 S. Ct. 508, 95 L. Ed. 573.

The Supreme Court of Mississippi has held that the business taxed in this instance obtained a business situs in the State of Mississippi. *Stone vs. Stapling Machines Company*, 71 So. (2d) 205, appeal to this Court being dismissed October 14, 1954, in Cause No. 106. Even if this were not true, it would not defeat the imposition of an income tax based upon the portion of appellant's income earned in the State of Mississippi. A tax placed on the receipts from interstate commerce does not violate the commerce clause of the Federal Constitution so long as the tax is apportioned to the earnings within the particular state. *Central Greyhound Lines vs. Mealey*, 334 U. S. 653, 68 S. Ct. 1260, 92 L. Ed. 1633. In the case of *Memphis Natural Gas Co. vs. Beeler*, 315 U. S. 649, 62 S. Ct. 857, 86 L. Ed. 1090, this court said:

> "In any case, even if taxpayer's business were wholly interstate commerce, a nondiscriminatory tax by Tennessee upon the net income of a foreign corporation having a commercial domicile there, . . . or upon net income derived from within the state, . . . is not prohibited by the commerce clause on which alone taxpayer relies . . . "

IV.

It is further suggested that the appellant has delayed too long in the prosecution of this appeal.

WHEREFORE PREMISES CONSIDERED, appellee prays that the appeal in this case be dismissed or that the judgment of the Supreme Court of the State of Mississippi be affirmed.

Respectfully submitted,

JOHN E. STONE
Attorney for Apellee

I, Bernard L. Tighe, acknowledge receipt of copy of the above and foregoing Statement Opposing Jurisdiction and Motion to Dismiss or Affirm, on the fourth day of November, 1954.

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